

104TH CONGRESS
1ST SESSION

H. R. 789

To amend title 17, United States Code, with respect to the licensing of music, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 1, 1995

Mr. SENSENBRENNER introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 17, United States Code, with respect to the licensing of music, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Fairness in Musical
5 Licensing Act of 1995”.

6 **SEC. 2. BUSINESS EXEMPTION.**

7 Section 110(5) of title 17, United States Code, is
8 amended to read as follows:

9 “(5) communication by electronic device of a
10 transmission embodying a performance or display of

1 a work by the reception of a broadcast, cable, sat-
 2 ellite, or other transmission, unless—

3 “(A) an admission fee is charged specifi-
 4 cally to see or hear the transmission, or

5 “(B) the transmission is not properly
 6 licensed,

7 except that this paragraph shall apply in the case of
 8 a performance or display in a commercial establish-
 9 ment only if the performance or display is incidental
 10 to the main purpose of the establishment;”.

11 **SEC. 3. BINDING ARBITRATION OF RATE DISPUTES INVOLV-**
 12 **ING PERFORMING RIGHTS SOCIETIES.**

13 (a) IN GENERAL.—Section 504 of title 17, United
 14 States Code, is amended by adding at the end the follow-
 15 ing new subsection:

16 “(d) PERFORMING RIGHTS SOCIETIES; BINDING AR-
 17 BITRATION.—

18 “(1) ARBITRATION OF DISPUTES PRIOR TO
 19 COURT ACTION.—

20 “(A) ARBITRATION.—(i) If a general music
 21 user and a performing rights society are unable
 22 to agree on the appropriate fee to be paid for
 23 the user’s past or future performance of musi-
 24 cal works in the repertoire of the performing
 25 rights society, the general music user shall, in

1 lieu of any other dispute-resolution mechanism
2 established by any judgment or decree govern-
3 ing the operation of the performing rights soci-
4 ety, be entitled to binding arbitration of such
5 disagreement pursuant to the rules of the
6 American Arbitration Association. The music
7 user may initiate such arbitration.

8 “(ii) The arbitrator in such binding arbi-
9 tration shall determine a fair and reasonable fee
10 for the general music user’s past and future
11 performance of musical works in such society’s
12 repertoire and shall determine whether the
13 user’s past performances of such musical works,
14 if any, infringed the copyrights of works in the
15 society’s repertoire. If the arbitrator determines
16 that the general music user’s past performances
17 of such musical works infringed the copyrights
18 of works in the society’s repertoire, the arbitra-
19 tor shall impose a penalty for such infringe-
20 ment. Such penalty shall not exceed the arbitra-
21 tor’s determination of the fair and reasonable
22 license fee for the performances at issue.

23 “(B) DEFINITION.—For purposes of this
24 paragraph, a ‘general music user’ is any person
25 who performs musical works publicly but is not

1 engaged in the transmission of musical works to
2 the general public or to subscribers through
3 broadcast, cable, satellite, or other trans-
4 mission. For purposes of this paragraph, trans-
5 missions within a single commercial establish-
6 ment or within establishments under common
7 ownership or control are not transmissions to
8 the general public.

9 “(C) ENFORCEMENT OF ARBITRATOR’S
10 DETERMINATIONS.—An arbitrator’s determina-
11 tion under this paragraph is binding on the
12 parties and may be enforced pursuant to sec-
13 tions 9 through 13 of title 9.

14 “(2) COURT-ANNEXED ARBITRATION.—In any
15 civil action for infringement of the right granted in
16 section 106(4) involving a musical work that is in
17 the repertoire of a performing rights society, if the
18 defendant admits the prior public performance of
19 one or more works in the repertoire of the perform-
20 ing rights society but contests the amount of the li-
21 cense fee demanded by such society for such per-
22 formance, the dispute shall, if requested by the de-
23 fendant, be submitted to arbitration under section
24 652(e) of title 28. In such arbitration proceeding,
25 the arbitrator shall determine the amount owed by

1 the defendant to the performing rights society for
2 all past public performances of musical works in the
3 society's repertoire. Such amount shall not exceed
4 two times the amount of the blanket license fee that
5 would be applied by the society to the defendant for
6 the year or years in which the performances oc-
7 curred. In addition, the arbitrator shall, if requested
8 by the defendant, determine a fair and reasonable
9 license fee for the defendant's future public perform-
10 ances of the musical works in such society's rep-
11 ertoire.

12 “(3) TERM OF LICENSE FEE DETERMINA-
13 TION.—In any arbitration proceeding initiated under
14 this subsection, the arbitrator's determination of a
15 fair and reasonable license fee for the performance
16 of the music in the repertoire of the performing
17 rights society concerned shall apply for a period of
18 not less than 3 years nor more than 5 years after
19 the date of the arbitrator's determination.”.

20 (b) ACTIONS THAT SHALL BE REFERRED TO ARBI-
21 TRATION.—Section 652 of title 28, United States Code,
22 is amended by adding at the end the following:

23 “(e) ACTIONS THAT SHALL BE REFERRED TO ARBI-
24 TRATION.—In any civil action for infringement of the
25 right granted in section 106(4) of title 17 involving a mu-

1 sical work that is in the repertoire of a performing rights
 2 society, if the defendant admits the public performance of
 3 any musical work in the repertoire of the performing
 4 rights society but contests the amount of the license fee
 5 demanded for such performance by the society, the district
 6 court shall, if requested by the defendant, refer the dispute
 7 to arbitration, which shall be conducted in accordance with
 8 section 504(d)(2) of title 17. Each district court shall es-
 9 tablish procedures by local rule authorizing the use of ar-
 10 bitration under this subsection. The definitions set forth
 11 in title 17 apply to the terms used in this subsection.”.

12 **SEC. 4. RADIO PER PROGRAMMING PERIOD LICENSE.**

13 Section 504 of title 17, United States Code, as
 14 amended by section 3 of this Act, is further amended by
 15 adding at the end thereof the following new subsection:

16 “(e) RADIO PER PROGRAMMING PERIOD LI-
 17 CENSES.—

18 “(1) IN GENERAL.—Each performing rights so-
 19 ciety shall offer, to any radio broadcaster that so re-
 20 quests, a per programming period license to perform
 21 nondramatic musical works in the repertoire of the
 22 performing rights society. Such license shall be of-
 23 fered on reasonable terms and conditions that pro-
 24 vide an economically and administratively viable al-

1 ternative to the society's blanket license for all such
2 broadcasters.

3 “(2) PRICE OF PER PROGRAMMING PERIOD LI-
4 CENSES.—(A) The total price of a per programming
5 period license described in paragraph (1)—

6 “(i) shall include separate components for
7 incidental and feature performances, which are
8 independent of the quantity of such perform-
9 ances by the broadcaster and do not exceed the
10 relative value the performing rights society as-
11 signs to such performances in its distribution of
12 royalties; and

13 “(ii) shall not exceed the fee that would be
14 payable by the broadcaster under the lowest
15 price blanket license offered to radio broad-
16 casters, and shall be in direct proportion to the
17 percentage of the broadcaster's revenue attrib-
18 utable to programming periods containing
19 feature performances of musical works in the
20 society's repertoire compared to the industry
21 average percentage of revenue attributable to
22 programming periods containing feature per-
23 formances of musical works in the society's rep-
24 ertoire.

1 “(B) Nondramatic musical works that have
2 been licensed directly or at the source, or whose per-
3 formance constitutes fair use or is otherwise exempt
4 from liability under this title, shall not be considered
5 in calculating any per programming period license
6 fee under this subsection.

7 “(3) ADMINISTRATION OF LICENSE.—Begin-
8 ning January 1, 1998, the performance of
9 nondramatic musical works by a broadcaster under
10 any per programming period license shall be deter-
11 mined on the basis of statistically reliable sampling
12 or monitoring by the performing rights society, and
13 the society may not require the broadcaster to report
14 such performance to the society. The society shall
15 provide the broadcaster with a report detailing the
16 results of such sampling or monitoring, identifying
17 each programming period containing the perform-
18 ance of nondramatic musical works in the society’s
19 repertoire and the nondramatic musical works
20 performed.

21 “(4) IMPLEMENTATION.—Any radio broad-
22 caster entitled to a per programming period license
23 under this subsection may bring an action to require
24 compliance with this subsection in an appropriate
25 United States district court, including any district

1 court established by court order or statute as a
2 court that resolves disputes, with respect to license
3 rates, that may arise between performing rights soci-
4 eties and persons who perform musical works in the
5 society's repertoire.

6 “(5) DEFINITIONS.—As used in this sub-
7 section—

8 “(A) the term ‘blanket license’ means a li-
9 cense provided by a performing rights society
10 that authorizes the unlimited performance of
11 musical works in the society's repertoire, for a
12 fee that does not vary with the quantity or type
13 of performances of musical works in the soci-
14 ety's repertoire;

15 “(B) the term ‘incidental’ means commer-
16 cial jingles not exceeding 60 seconds in dura-
17 tion, bridges, themes or signatures, arrange-
18 ments of works in the public domain, and back-
19 ground music, including music used in conjunc-
20 tion with sporting events; and

21 “(C) the term ‘programming period’ means
22 any 15-minute period of radio broadcasting
23 commencing on the hour, or at 15, 30, or 45
24 minutes past the hour.”.

1 **SEC. 5. ACCESS TO REPERTOIRE AND LICENSING INFORMA-**
2 **TION.**

3 Section 504 of title 17, United States Code, as
4 amended by sections 3 and 4 of this Act, is further amend-
5 ed by adding at the end the following:

6 “(f) ACCESS TO MUSICAL REPERTOIRE.—

7 “(1) ONLINE COMPUTER ACCESS.—Each per-
8 forming rights society shall make available, free of
9 charge, to all interested persons, online computer ac-
10 cess to copyright and licensing information for each
11 work in its repertoire. Such access shall, for each
12 such musical work, identify the work by title of the
13 work, the name, address, and telephone number of
14 both the author and the copyright owner, when the
15 work will enter the public domain, and the names of
16 any artists known to have performed the work. Such
17 online computer access shall permit the efficient re-
18 view of multiple musical works consistent with rea-
19 sonably available technology.

20 “(2) DIRECTORY OF TITLES.—Each performing
21 rights society shall make available at no charge, not
22 less frequently than semiannually, a printed direc-
23 tory of each title in its repertoire, as of the date
24 which is not more than 30 days before the date on
25 which the directory is published, containing the in-
26 formation set forth in paragraph (1).

1 “(3) DOCUMENTATION OF RIGHT TO LI-
2 CENSE.—A performing rights society shall, upon the
3 request of any person who performs or may perform
4 musical works in the society’s repertoire, provide to
5 that person copies of the documentation establishing
6 the society’s right to license the public performance
7 of such musical works.

8 “(4) RESTRICTIONS ON INFRINGEMENT AC-
9 TIONS.—

10 “(A) RESTRICTIONS.—A performing rights
11 society may not institute or be a party to, or
12 pay the costs of another party in, any action al-
13 leging the infringement of the copyright in, or
14 charge a fee under any per programming period
15 license for, any work in that society’s repertoire
16 that is not identified and documented as re-
17 quired by paragraphs (1), (2), and (3).

18 “(B) EXCEPTION.—Subparagraph (A)
19 shall not apply on the basis of a failure to com-
20 ply with paragraph (2) with respect to a musi-
21 cal work first entering the society’s repertoire
22 within the 6-month period beginning 30 days
23 before the date on which the society’s last direc-
24 tory was published under paragraph (2), if the
25 society establishes that such musical work was

1 included in the online database required by
2 paragraph (1) not less than 10 days before the
3 performance giving rise to the alleged infringe-
4 ment or charge.

5 “(g) ACCESS TO LICENSING INFORMATION.—

6 “(1) TERMS OF LICENSES.—Each performing
7 rights society shall provide, within 5 business days
8 after it receives a written request from a licensee of
9 any musical work in the society’s repertoire, or from
10 any person that is negotiating to become such a
11 licensee—

12 “(A) a schedule of the society’s license
13 rates for those licensees in the same locality as
14 the licensee or person making the request, that
15 have characteristics similar to such licensee or
16 person, except that the society shall provide in-
17 formation with respect to at least 5 but not
18 more than 10 such licensees;

19 “(B) the formulas by which the rates are
20 derived; and

21 “(C) license terms under agreements exe-
22 cuted by the performing rights society and li-
23 censees described in subparagraph (A).

24 “(2) COPIES OF LICENSES.—Each performing
25 rights society shall provide, within 5 business days

1 after receiving a written request from an entity au-
2 thorized to negotiate license fees and terms on be-
3 half of any group of persons who perform or may
4 perform musical works within that society's rep-
5 ertoire, copies of all forms of licenses negotiated be-
6 tween that society and other entities authorized to
7 negotiate license fees and terms on behalf of any
8 group of persons who perform musical works in that
9 society's repertoire, except that the society shall not
10 disclose individual licensee's names, addresses, or
11 business confidential information.''.
12

SEC. 6. ANNUAL REPORTS.

13 Not later than March 1 of each year, the Attorney
14 General of the United States shall submit a written report
15 to the Congress on the activities of the Department of
16 Justice during the preceding calendar year relating to the
17 continuing supervision and enforcement by the Depart-
18 ment of the consent decree of the American Society of
19 Composers, Authors, and Publishers of March 14, 1950,
20 and the consent decree of Broadcast Music, Inc. of Decem-
21 ber 29, 1966. Such report shall include a description of
22 all issues raised or complaints filed with the Department
23 of Justice relating to the operations of those performing
24 rights societies, and a summary of the Department's ac-

1 tions or investigations undertaken by the Department in
2 response to such issues and complaints.

3 **SEC. 7. VICARIOUS LIABILITY PROHIBITED.**

4 A landlord, an organizer or sponsor of a convention,
5 exposition, or meeting, a facility owner, or any other per-
6 son making space available to another party by contract,
7 shall not be liable under any theory of vicarious or con-
8 tributary infringement with respect to an infringing public
9 performance of a copyrighted work by a tenant, lessee,
10 subtenant, sublessee, licensee, exhibitor, or other user of
11 such space on the ground that—

12 (1) a contract for such space provides the land-
13 lord, organizer or sponsor, facility owner, or other
14 person a right or ability to control such space and
15 compensation for the use of such space; or

16 (2) the landlord, organizer or sponsor, facility
17 owner, or other person has or had at the time of the
18 infringing performance actual control over some as-
19 pects of the use of such space,

20 if the contract for the use of such space prohibits infring-
21 ing public performances and the landlord, organizer or
22 sponsor, facility owner, or other person does not exercise
23 control over the selection of works performed.

1 **SEC. 8. RELIGIOUS SERVICE EXEMPTION.**

2 Section 110(3) of title 17, United States Code, is
3 amended by inserting after “religious assembly” the fol-
4 lowing: “, the transmission of such services, whether live
5 or recorded, or the recording of copies or phonorecords
6 of a transmission program embodying such services in
7 their entirety”.

8 **SEC. 9. CONFORMING AMENDMENTS.**

9 (a) DEFINITIONS.—Section 101 of title 17, United
10 States Code, is amended by inserting after the undesig-
11 nated paragraph relating to the definition of “perform”
12 the following:

13 “A ‘performing rights society’ is an association,
14 corporation, or other entity that licenses the public
15 performance of nondramatical musical works on be-
16 half of copyright owners of such works, such as the
17 American Society of Composers, Authors, and Pub-
18 lishers, Broadcast Music, Inc., and SESAC, Inc. The
19 ‘repertoire’ of a performing rights society consists of
20 those works for which the society provides licenses
21 on behalf of the owners of copyright in the works.”.

22 **SEC. 10. CONSTRUCTION OF ACT.**

23 Except as provided in section 504(d)(1) of title 17,
24 United States Code, as added by section 3(a) of this Act,
25 nothing in this Act shall be construed to relieve any per-
26 forming rights society (as defined in section 101 of title

1 17, United States Code) of any obligation under any con-
2 sent decree or other court order governing its operation,
3 as such decree or order is in effect on the date of the
4 enactment of this Act, as it may be amended after such
5 date, or as it may be issued or agreed to after such date.

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